IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4404 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHESHKUMAR DITABHAI MACHAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 4404 of 2003

MR RJ GOSWAMI for Petitioner No. 1-5

MR VM PANCHOLI, APP for Respondent No. 1

MR BY MANKAD for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 23/07/2003

ORAL C.A.V. JUDGEMENT

The petitioners herein have preferred this

petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code") in order to pray to quash a First Information Report being C.R.No. - I 41/2003 registered with Dahod Town Police Station at Dahod in Dahod District against the petitioners for offences punishable under Sections 120(B), 363, 366, 506(1) read with Section 114 of IPC.

2. The informant of the said FIR, Dr.Singhraj Kalubhai of Dahod has stated in his FIR that his daughter Rakshakumari has been studying in Second Year of Diploma in Civil Engineering in Dahod Polytechnic at Dahod; that she is 17 years of age; that on 26/05/03 she was sent for buying ice-cream at about 3.45 PM, but she did not return; that a few days earlier, some telephonic messages were received from the first petitioner and threats were given that if Rakshakumari was not given in marriage to the first petitioner, then he would take away the said girl; that he had replied the first petitioner that Rakshakumari is minor and he did not want to give her in marriage to the first petitioner; that despite the said position the first petitioner and his parents etc. used to give threats on telephone and used to bring pressure on the informant for giving Rakshakumari in marriage to the first petitioner; that thereafter, as per the FIR, the informant went out of his residence to inquire about the whereabouts of his daughter, Rakshakumari; that at some distance, he found Rakshakumari coming from the opposite direction; that at that time, the first petitioner and his brother-in-law, petitioner no.4, both came from behind and caught hold of Rakshakumari and dragged her forcibly towards a white Maruti Car and she was forced to sit in the said car; that thereafter, all of them ran away in the said car. Therefore, the said FIR was filed by the petitioner on the next evening i.e. on 27/04/03 at 8.15 PM.

3. The petitioner has challenged the said FIR mainly on the ground that no offence is made out. On receiving the petition, Notice was issued and in response to the service of notice, Mr.V M Pancholi learned APP has appeared for the State and Mr.B Y Mankad has appeared for the second respondent, the original informant. I have heard learned advocates for the parties and have perused the papers.

4. Mr.N D Nanavati learned Sr.Advocate appearing with Mr.R J Goswami for the petitioners has taken me through the order of this Court dated 24/06/03 passed in Cr.M.A.No.4526/2003. It relates to the very offence. However, in view of the circumstances of the case, the

following order was passed by this Court in the said matter;

"In view of the aforesaid, the order passed in Cr.M.A.No.4172/2003 is required to be modified to that extent and applicant no.2 is required to be relieved from his obligation to keep the girl i.e. applicant no.1 present at the police station on 25/06/03. The sum and substance of this order is that the I.O. shall go to the residence of applicant no.1 to record her statement in accordance with the aforesaid direction and so far as applicant no.2 is concerned, he has to report to the Jhalod Police Station on the aforesaid date and time, but he will not require to take applicant no.1 alongwith him. He may supply the complete address and telephone no., if any, of applicant no.1 to enable the I.O. to contact her for the aforesaid purpose."

5. It has been argued here also that the maternal uncle of Rakshakumari is also a Police Inspector in the aforesaid Police Station and therefore, his presence is likely to influence the investigation. Therefore, the above order appears to have been passed by this Court in the said matter.

6. Now, it is an admitted position that the statement of the girl has not been recorded in the aforesaid investigation and it has been contended by the petitioners that the girl is above the age of 18 years. In respect of the said contention, a true copy of the Birth Certificate has been produced at page 7, showing the date of birth of Rakshakumari to be 21/01/85, which would mean that on the date of the alleged offence i.e. on 26/04/03, the girl would be above the age of 18 years. On the other hand, the original informant has filed affidavit and documents showing that the birth date of Rakshakumari is 16/08/85. Even the School Leaving Certificate shows that the date of birth of Rakshakumari is 16/08/85. It has also been contended by Mr.B Y Mankad for the contesting respondent that the present petitioners have played mischief with the aforesaid record and the date has been wrongly changed, by removing the original papers from the Birth Register. This would be a subject matter of inquiry, either by the police or by the concerned department.

7. However, it remains on record that at one place, the date of birth of Rakshakumari is shown to be 21/01/85

and at another place it is shown as 16/08/85. Now, if we consider 16/08/85 to be the real birth date of Rakshakumari, then she would be below the age of 18 years on the date of the alleged offence i.e. on 26/04/03 and therefore, there would be a prima facie offence under Section 366 of IPC. It has then been contended that after Rakshakumari had left her residence voluntarily, the petitioner and Rakshakumari both have contracted marriage and the registration certificate of marriage has been produced by the petitioner, along with this petition at page 5 which shows that on 02/05/03, the first petitioner and Rakshakumari have married. This would again be a question of fact which can be dealt with by the investigating police officer. It is also required to be considered as to whether there was willingness on the part of the girl in contracting the marriage. Learned advocate for the contesting respondent has argued that Rakshakumari was below the age of 18 years and therefore, she could not marry without the consent of her parents. This would be a subject matter of dispute under the Hindu Marriage Act and it is not necessary to deal with and decide the same in this petition.

8. The learned advocate for the petitioner has relied upon a decision of the Hon'ble the Supreme Court in Sangita Rani (Smt.) V/s. State of U.P. reported in 1992 SCC (Cri.) 391. There the facts were a little different. A muslim boy married a hindu girl. The father of the girl had filed FIR. The boy apprehended trouble from the said informant and sought police protection. The Hon'ble the Supreme Court found that there was a valid marriage and both the spouses were major and living together for about eight months. The wife was pregnant. The Hon'ble the Supreme Court, therefore, observed, on the aforesaid facts that, in view of the above position, the marriage should be sustained and nothing should be allowed to happen which would affect that position. Therefore, the said FIR was quashed having regard to the special facts which appeared on the record of that matter.

9. It has also been argued on behalf of the petitioners by the learned Sr.Advocate that the age of the girl is such that a girl was in a position to understand the consequences of her deeds. That when the girl is capable of understanding the consequences of her deeds, mere fact that she had not completed 18 years of age would not be a ground for proceeding with the investigation and therefore also the FIR should be quashed.

10. Now, before quashing FIR or a complaint, the overall picture of the matter has to come on record. In the earlier decision of the Hon'ble the Supreme Court, some more facts were brought on record, which have been enumerated hereinabove. In the present case, we find that the statement of the girl has yet not been recorded and it is noticed that the statement of the girl could be recorded, in accordance with the directions contained in para 3 of the decision of this Court, in Cr.M.A.No.4526/2003 referred to hereinabove. Further, the statement of the girl has not been recorded and therefore, what is the trend and stand of the girl is not a matter on record of the investigation papers.

11. On the other hand, the learned APP has relied upon a decision of the Hon'ble the Supreme Court in State of Karnataka V/s. M.Devendrappa reported in JT 2002(1) SC, 213. There the Hon'ble the Supreme Court has observed as follows;

"The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest court of a state should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.

It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the

proceedings is called for only in a case where the complaint does not disclose any offence or it frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is malafide, frivolous or vexatious, in that event here would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fide against the informant are of no consequence and cannot by itself be the basis for quashing the proceedings.

The order of learned single Judge cannot be maintained. The same is set aside. The appeal is allowed. We, however, make it clear that whatever we have stated above should not be considered to be expression of opinion regarding the merits of the case, which it goes without saying, has to be considered by the concerned court at an appropriate stage".

12. Now, unless the statement of the girl is recorded, it would not be possible for this Court to know as to whether the girl has voluntarily left her house, in order to go to stay with the petitioners and to marry the first petitioner. It is true that there was some order of this Court staying further investigation into the matter. However, the girl was kept present and it was made clear that there was no objection if the statement of the girl was recorded. Anyway, the statement of the girl has not been recorded and therefore, it would not be possible to ascertain the willingness or otherwise of the girl, for the purpose of deciding that there is no prima

facie offence shown to have been committed by the petitioners. Except the FIR, nothing more appears to have been found from the record of investigation papers and on the basis of the FIR and School Leaving Certificate, it cannot be said that the girl was above the age of 18 years and therefore, so far the offence punishable under Section 366 IPC is concerned, the said offence can be said to have been committed prima facie, if the age of the girl is found to be below the age of 18 years. In the present case, we find that there is prima facie material to show that the age of the girl on the date of the alleged offence was below 18 years and therefore, prima facie it cannot be said that no offence is made out against the petitioners for offence punishable under Section 366 IPC, which is said to have been committed in presence of the informant.

13. So far the recording of statement is concerned, Mr.B Y Mankad learned advocate for the original informant has argued that mere recording of statement of the girl would not be enough. He has also argued that even the medical examination of the girl will be necessary and therefore, for the said purpose, the girl may be required to be taken to Godhra or Dahod. Now, some apprehension has been shown by the girl herself about the interest which may be taken by her maternal uncle, who is a Police Officer attached to the said Police Station and therefore, the above order appears to have been passed by this Court on 24/06/03. In light of the background of the said order, even the medical examination of the girl can be undertaken at any place, other than Dahod or Godhra where the facilities are available. If it requires merely a clinical examination, a competent Medical Officer can render his service for the said purpose. On the other hand, if Ossification Test is required to be undertaken for the purpose of ascertaining the age of the girl, she can be sent to an appropriate hospital having such facilities. Even requests could have been made for the said purpose before this Court and appropriate order could have been passed, after hearing the parties.

14. Anyway, it remains a matter of fact that the statement of girl has yet not been recorded and without looking at the statement of the girl, it would not be possible to say with certainty that no prima facie case is made out against the petitioners, with respect to the offences alleged in the said FIR. Now, if it is not possible to say with certainty that no prima facie case is made out against the petitioners, then it would not be

possible to this Court to quash the FIR at this preliminary stage.

15. Even the Hon'ble the Supreme Court has time and again observed that the powers vested by Section 482 of the Code are required to be exercised very sparingly, in a rarest of rare case. This cannot be considered to be a rarest of rare case. Hence, it is not possible to ascertain from the FIR that no offence is made out. On the contrary, the FIR discloses that the girl was below the age of 18 years and she was forcibly dragged in presence of the informant in a broad day light. It is also submitted at the bar that the petitioners have played mischief with the records of the Gram Panchayat for altering the birth date of Rakshakumari, in order to show that she was more than 18 years of age, on the date of the incident. This would, therefore, not be a proper case for exercising extraordinary jurisdiction in favour of the petitioner for quashing the FIR. In above view of the matter, I am of the view that this cannot be treated to be a fit case for exercising inherent jurisdiction for quashing the FIR.

16. Consequently, this petition is dismissed. Notice is discharged. Interim relief granted earlier, naturally stands vacated.

(D. P. Buch, J.)

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FURTHER ORDER

17. At this stage, learned Advocate for the petitioner states that the petitioner desires to file appropriate proceedings against the order as aforesaid and therefore, the stay order granted by this Court may be extended for a period of six weeks.

18. Mr V M Pancholi, learned APP objects to this.

Mr.B Y Mankad, learned Advocate appearing for the contesting respondent also objects to this and states that the girl - Rakshakumari may be sent to Narigruh. So far as the last prayer is concerned, this was never prayed here before and the prayer is sought for the first time on behalf of the respondent. Therefore, it is not possible to consider this prayer at this stage. It would be open to the contesting respondents to make appropriate application in appropriate Court, at appropriate time. So far as the time is concerned, looking to the subject matter in dispute, three weeks time is granted and therefore, the stay order granted, stands extended for a period of three weeks from today.

(D. P. Buch, J.)

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